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Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~498~~ //

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents-Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,

RENÉ H. HIMEL, JR.,

Of Counsel.

BLEED THROUGH

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents-Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray for issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit (Rives, J., dissenting) reversing the District Court for the Eastern District of Louisiana, and sustaining the jurisdiction of that court over actions brought at law under a state statute directly against petitioners as marine underwriters of the owner and charterer of the

Towboat JANE SMITH by representatives of seamen lost with the vessel, despite injunctive process issued in limitation proceedings instituted under federal legislation in admiralty prohibiting such actions against the owner and charterer, and despite provisions in the marine policies themselves prohibiting such direct actions against the underwriters; and petitioners respectfully show:

I

Question Presented

The novel and important question of law presented for determination in this proceeding is:

> May jurisdiction validly be granted by state statute over direct actions at law by representatives of deceased seamen against the marine underwriters of the shipowner and charterer (the seamen's employer), despite pendency of injunctive process in a proceeding instituted under federal legislation in admiralty for limitation of the liability of both the owner and charterer, restraining suits against them elsewhere than in the limitation proceeding, in impairment of provisions in the marine policies prohibiting such direct action, and in violation of the Jones Act, the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters?

Because of practically universal coverage of the liability of shipowners by marine protection and indemnity insurance, failure on the part of this court to determine this

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question will inevitably leave marine underwriters uncertain or confused as to whether their policies are to be governed by the uniform maritime law, or by the vagaries of state enactments, *quoad* the rights of merchant seamen in all courts throughout the nation.

II

Jurisdiction and Opinions Below

The jurisdiction of this court is invoked under 28 USC 1254(1).

The opinion of the District Court (Tr 11-17) is reported at 99 Fed. Sup. 681, 1951 AMC 1878. The original opinion of the Court of Appeals (Tr 29-34), filed July 31, 1952, is reported at 198 F2d 536, 1952 AMC 1803. Rehearing was denied October 9, 1952, with a dissenting opinion (Tr 45-47), reported at 198 F2d 1021, 1952 AMC 1808.

III

Summary Statement of Matter Involved

Petitioners are the marine protection and indemnity underwriters of the owner and bare-boat charterer of the Towboat JANE SMITH.[1] Respondents are the representatives of five members of her crew, lost when the vessel capsized and sank following collision with a railway bridge spanning the Atchafalaya River in Louisiana.

[1] The policy of The Home Insurance Company insures both owner and charterer. The separate policy of the Maryland Casualty Company, by marine endorsement, runs in favor of the charterer (employer) only.

The owner and charterer of the towboat filed consolidated petitions in admiralty for limitation of liability. Injunctions were issued in the limitation proceeding restraining institution elsewhere than in that proceeding, of actions against the owner and charterer of the vessel. Respondents filed claims in the limitation proceeding against both owner and charterer, for damages for their decedents' deaths.

Thereafter, however, enjoined from suing the shipowner and charterer elsewhere than in the limitation proceeding in admiralty, respondents filed the present actions at law against petitioners as underwriters of the shipowner and charterer, under a Louisiana statute which creates a direct right of action against liability insurers of tortfeasors generally,[2] to enforce independent recovery against the underwriters, on the claims already filed against the owner and charterer in the limitation proceeding.

Each of the marine policies involved contains a clause prohibiting suit against the underwriter until after the assured shall actually have paid a loss, or shall have had his liability determined judicially.

The district judge dismissed the actions,[3] holding that the Legislature of Louisiana obviously did not intend its direct-action statute "to be applicable to marine insurance"; that "the value of the interest to be surrendered in limitation under our law is the value after the collision", and that under this court's opinion in *The City of Norwich*,

[2] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655, reprinted in Appendix A.

[3] Tr 11-18; Cushing vs Texas & P. Ry. Co., 99 Fed. Sup. 681 (ED La.-1951).

118 US 468, "the shipowner is then free to claim the insurance money as his own"; that Congress, "under its constitutional prerogative to provide laws affecting admiralty and maritime jurisdiction, has occupied the field of limitation of liability including contracts of insurance as they relate to the same"; and that "to give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law, but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act".

The district court's judgment of dismissal was reversed by the Court of Appeals for the Fifth Circuit,[4] which held that the Louisiana direct-action statute is legislatively intended to apply to marine policies; that although the statute confers "upon an injured party a substantive right", nothing therein "undertakes to change the substantive admiralty law"; that construction of the statute to support jurisdiction over these actions is not precluded by the Jones Act, nor by pendency of the proceeding in admiralty for limitation of liability; and that the state statute was valid, in any event, under the McCarran Act.

Application for rehearing was denied without opinion by a majority of the Court of Appeals, Judge Rives dissenting in a written opinion[5] in which he stated: "A reconsideration of this case compels me to agree with the opinion

[4] Tr 29-34; 198 F2d 536 (CA 5-1952).
[5] Tr 45-47; 198 F2d 1021 (CA 5-1952).

of the learned district judge . . . that in the enactment of the Louisiana direct-action statute . . . the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government"; that, in any event, "the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability"; that these principles were "not changed by the McCarran Act" which "was never intended to validate state law contravening provisions of the constitution other than the commerce clause"; and that under the opinion of this court in *The City of Norwich*, "the Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute".

In the present posture of the case, therefore, jurisdiction of the district court over the actions at bar is maintained on the holding of two judges of the Court of Appeals, with one judge of that court and the district judge holding against jurisdiction.

IV

Reasons Relied on for Allowance of the Writ

A—State Impairment of Maritime Contracts and Uniformity of Maritime Law

Entertainment of jurisdiction over the instant proceedings under a state statute which eliminates from the

marine policies involved their clauses prohibiting institution of such actions, effects state impairment of maritime contracts, a drastic change in substantive maritime law, and destruction of the nationwide uniformity of important features of that system, in conflict with decisions of this court and of the Courts of Appeals for the First, Second and Ninth Circuits, all noted hereunder.

It has been held directly by this court and by the Court of Appeals for the Second Circuit, that state laws are as powerless to alter the terms of maritime contracts—which are made in contemplation of the general admiralty law—as they are to impair the obligations of contracts generally.[6]

The reliance of the majority of the court below on *Red Cross Line vs Atlantic Fruit Co.*[7] is obviously misplaced. That opinion merely upheld procedural enforcement, pur-

[6] Union Fish Co. vs Erickson, 248 US 308 (1919); Rodgers & Hagerty vs City of New York, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621. See also: Aetna Ins. Co. vs Houston Oil & Transp. Co., 49 F2d 121 (CA 5-1931), cert. den., 284 US 628, in which it was held by the Court of Appeals for the Fifth Circuit that a marine insurance policy was to be "governed by the general admiralty law and not by the law of Texas". This, as recognized in the dissenting opinion in the case at bar (198 F2d 1021-22), gives rise to an intra-circuit conflict, and calls for review by this court. Dickinson vs Petroleum Corp., 338 US 507, 508 (1950). See: Fisher vs Home Indemnity Co., 198 F2d 218 (CA 5-1952), decided by a different panel of judges of the court, holding the Louisiana direct-action statute invalid as applied to a policy prohibiting direct actions, when issued in another state. In Elbert vs Lumbermen's Mutual Casualty Company, 107 Fed. Sup. 299 (WD La.-1952), Judge Dawkins has held the entire Louisiana direct-action statute to be an unconstitutional effort of the state legislature to confer jurisdiction on the federal courts by giving a direct right of action against underwriters invariably of diverse citizenship from local plaintiffs. In Lewis vs Manufacturers Casualty Insurance Company, 107 Fed. Sup. 465 (WD La.-1952), Judge Porterie held to the contrary, relying squarely on the majority opinion of the Court of Appeals in the instant case. This court has heretofore granted certiorari "because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court . . ." Hughes, CJ, in John Hancock Ins. Co. vs Bartels, 308 US 180, 181 (1939).

[7] 264 US 109 (1924).

suant to state law, of an arbitration clause voluntarily included in a maritime contract and substantively valid under admiralty law. The instant decision of the Court of Appeals, on the contrary, permits nullification of otherwise valid "no-action" clauses in marine policies through enforcement of a concededly substantive right of action created by state statute [8]—a right certainly not sanctioned by the maritime law.[9]

Application of such statutes to govern maritime causes of action obviously effects a drastic and unconstitutional change in that law, as has been held in analogous situations by this court and by the Courts of Appeals for the First and Ninth Circuits.[10]

Further, in view of the practically universal marine insurance coverage of shipowners throughout the nation, application of state direct-action statutes to maritime causes necessarily has the substantive effect of defeating the intendment of the Limited Liability Act [11] in subversion of national uniformity of the maritime law,[12] and of the supremacy clause [13] of the Constitution.

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[8] While the Court of Appeals said that "there is nothing in" the Louisiana direct-action statute "which undertakes to change the substantive admiralty law", it was constrained to hold that the act "confers upon an injured party a substantive right" against the tortfeasor's insurer. In Lewis vs Manufacturers Casualty Insurance Co., *supra*, note 6, 107 Fed. Sup. 465, 469 (WD La.-1952), Judge Porterie stated that the Louisiana direct-action statute "has been declared so many times to be substantive by final authority that we deny this phase of defendant's motion without elaboration by merely citing the latest case on the point"—the instant majority opinion of the Court of Appeals.

[9] The City of Norwich, 118 US 468 (1886); The Donald T. Wright, 30 Fed. Sup. 610 (WD Ky.-1939).

[10] Garrett vs Moore-McCormack Co., 317 US 239 (1942); The Lottawanna, 21 Wall. (88 US) 558 (1874); Jansson vs Swedish American Line, 185 F2d 212 (CA 1-1950); Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531 (CA 9-1941), cert. den., 314 US 690.

[11] See *post*.

[12] Constitution, Article III, sec. 2.

[13] Article VI.

The legislature of Louisiana, apparently recognizing the State's constitutional impotence to apply its direct-action statute to maritime causes of action, expressly provided that it was not to have such application, as the district court and the dissenting judge of the Court of Appeals both held.

The Louisiana direct-action statute is contained in Part XIV of the Louisiana Insurance Code.[14] Section 611, at the head of the same Part, declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine".

In ignoring this plain pronouncement, the majority of the Court of Appeals must simply have failed to realize that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not Inland Marine insurance at all, but Ocean Marine business".[15]

B—Unimpaired Limitation of Shipowners' Liability

Acceptance, under the state statute, of jurisdiction at law over these actions directly against the underwriters of a shipowner and charterer who have themselves petitioned for limitation of liability in admiralty, effects cir-

[14] Louisiana Revised Statutes of 1950, Title 22, section 655, reprinted in Appendix A.

[15] National Underwriter Service, FC&S Bulletins, Inland Marine, Aa-1, April, 1939. The term "ocean marine" like "wet marine", is used to distinguish true marine insurance from so-called "inland-marine" or land transportation insurance, which does not cover marine or water-borne risks at all, but only fire, theft and related lines. 4 Appleman, Insurance 4-5, sec. 2104. Winter, in his leading work on "Marine Insurance", states (p. 117) that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance".

cumvention and practical nullification of the Limited Liability Act,[16] in conflict with a holding of the Court of Appeals for the Sixth Circuit, and with this court's decision that a petitioning shipowner may not be forced to surrender his insurance proceeds into his limitation fund.

Even under the Louisiana direct-action statute, the present respondents have no claims, contractual or in tort, directly against petitioners, but are merely permitted to assert, vis-a-vis petitioners, their claims against the insured shipowner and charterer who have instituted limitation proceedings.[17]

This court has held directly that during pendency of such proceedings, claims for "debts and liabilities of the" shipowner may not be asserted elsewhere.[18]

The instant opinion of the majority of the Court of Appeals conflicts on this point, with that of the Court of Appeals for the Sixth Circuit, which holds that the Limited Liability Act is written into, and precludes direct recourse

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[16] 46 USC 183-189, reprinted in part in Appendix B. See also Rules 51 to 54, inclusive, of this court's Rules of Practice in Admiralty and Maritime Cases.

[17] Ruiz vs Clancy, 182 La. 935 (1935); Graham vs American Employers' Ins. Co., 171 So. 471 (La. App.-1937). These and other Louisiana cases hold that in proceedings under the direct-action statute, all defenses of the assured are available to the underwriter. In the case at bar, however, the majority of the Court of Appeals refused to follow this construction of the Louisiana statute by the Louisiana courts, in failing to grant to the instant underwriters their assureds' defense, under injunctive process in the pending limitation proceedings, against suits filed elsewhere. "Ordinarily, when an insured's immunity from an action is absolute, there likewise can be no action against the insurer." Stephenson vs List Laundry & Dry Cleaners, Inc., 168 So. 317, 320 (La. App.-1936), aff'd, 186 La. 11.

[18] The San Pedro, 223 US 365 (1912); Providence & N. Y. SS Co. vs Hill Mfg. Co., 109 US 578 (1883). "The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding." Rule 51, Admiralty Rules of this court. Such an order is outstanding in the case at bar. Tr 19.

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against, the undertakings—"impliedly subject to the enforcement of the limited liability statute"—of shipowners' sureties,[19] whose position is closely analogous to that of marine P&I underwriters.[20]

In thus depriving petitioners of the benefits of the Limited Liability Act, the majority opinion of the Court of Appeals further conflicts with this court's holding that the benefits of that Act are available to shareholders of a shipowning corporation subject, under state law, to direct actions for a corporation's debts.[21]

The majority decision of the Court of Appeals also conflicts with this court's emphatic declaration that to "compel the shipowner to surrender his insurance in order to have the benefit of limited liability . . . would defeat the principal object of the law" which was to encourage the merchant marine.[22]

While the cited case involved hull insurance, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage is to indemnify an insured shipowner for his own losses, not to provide a fund for claimants in his limitation proceeding.[23]

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[19] Monongahela River Consol. Coal & Coke Co. vs Hurst, 200 Fed. 711, 717 (CA 6-1912), cert. den., 226 US 608, 612. See also: Société Napthés Transports vs Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652.

[20] The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. Edwards vs Royal Indemnity Co., 182 La. 171 (1935).

[21] Flink vs Paladini, 279 US 59 (1929).

[22] The City of Norwich, 118 US 468, 504 (1886).

[23] "It is true that in The City of Norwich, the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in The City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance." Wright, J., in Cushing vs Texas & P. Ry. Co., 99 Fed. Sup. 681, 684 (ED La.-1951), quoted with approval by Rives, Cct. J., in his dissent in the Court of Appeals, 198 F2d 1021, 1022 (CA 5-1952).

To allow marine insurance protection to be drained away by direct actions under state law, may deprive the shipowner of the benefits of limitation of liability under federal law as effectively as if he were required expressly by state law to surrender the full amount of his insurance coverage, as well as his vessel, into the federal limitation fund.

C—Exclusive Remedy under Jones Act

Retention of jurisdiction over these actions under the state statute is in open conflict with this court's holding that the provisions of the Jones Act,[24] which affords the exclusive remedy for seamen's death actions against their employers, may not be altered or extended by state law.

The Court of Appeals held that it was unnecessary to determine the question as to whether a state may extend the provisions of the Jones Act by creating a right of action against an employer's underwriter, because "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

This is diametrically contrary to this court's repeated holding that the right of action for fault of a deceased seaman's employer lies against that employer alone, exclusively under the Jones Act which may not be altered

[24] Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 USC 688, reprinted in Appendix C.

or expanded by state law,[25] and which provides no right of action against the employer's underwriter.

D—McCarran Act Inapplicable to Marine Insurance

Interpretation of the McCarran Act [26] as sanctioning the application of state direct-action statutes to maritime law and federal legislation, is contrary to this court's holding as to the historical purposes and scope of that Act, and transgresses the Constitutional limitations, also recognized by this court, on the power of Congress to delegate its authority to legislate in maritime matters.

This court has recognized that the sole purpose of the McCarran Act was to remove the ban of the commerce clause from the sphere of state legislation dealing with insurance.[27] In passing the McCarran Act, Congress could not have intended, for it had no constitutional authority, to abdicate to the states its exclusive power to legislate in maritime matters.[28]

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[25] Northern Coal Co. vs Strand, 278 US 142 (1928); Lindgren vs United States, 281 US 38 (1930); Cosmopolitan Shipping Co. vs McAllister, 337 US 783 (1949). This phase of the argument applies only to the claims made against petitioners as underwriters of the charterer-employer. See *supra*, fn. 1.

[26] 59 Stat. 33, 15 USC 1011, *et seq.* (relevant portions reprinted in Appendix D).

[27] Prudential Ins. Co. vs Benjamin, 328 US 408 (1946). "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." House Report No. 143, 79th Cong., 1st Sess., p. 3 (1945), on the bill which became the McCarran Act.

[28] The Thomas Barlum, 293 US 21 (1934); Knickerbocker Ice Co. vs Stewart, 253 US 149 (1920).

V

Conclusion

Petitioners accordingly respectfully submit that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

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APPENDIX A

Louisiana Direct-Action Statute

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the

insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.

APPENDIX B

Limited Liability Act—(Extracts)

"The liability of the owner of any vessel . . . for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

RS 4283, as amended by 49 Stat. 1479, 46 USC 183(a).

"Whenever . . . the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each (claimant) . . . they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose . . . the owner of the vessel . . . may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

RS 4284, as amended by 19 Stat. 251, 46 USC 184.

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels. . . ."

RS 4286, 46 USC 186.

"Except as otherwise specifically provided therein, the (foregoing) provisions . . . shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation. . . ."

RS 4289, as amended by 49 Stat. 1481, 46 USC 188.

APPENDIX C

Jones Act

(Merchant Marine Act of 1920, section 33)

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

41 Stat. 1007, 46 USC 688.

APPENDIX D

McCarran Act—(Extracts)

"Congress declares that the continued regulation and taxation by the several States of the business of insurance

is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . ."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

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